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Nos. 82-707 and 82-804

In the Supreme Court of the United States

OCTOBER TERM, 1982

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
PETITIONER
v.
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority, in cases where a tariff calling for a rate increase is filed without complying with the Commission's symbolization regulations and that tariff then goes into effect, to invalidate the filing upon discovery of the defect and thereby render the improperly filed tariff void ab initio.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 2

Discussion 7

Conclusion 12

Appendix 1a

TABLE OF AUTHORITIES

Cases:

American Trucking Association v. *United States*, 688 F.2d 1337 ..... 7-8, 9

Arizona Grocery Co. v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370 3

Berwind-White Coal Mining Co. v. *Chicago & E. R.R.*, 235 U.S. 371 11

Chicago, M., St.P. & P. R.R. v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 9

Davis v. *Portland Seed Co.*, 264 U.S. 403 11

Genstar Chemical, Ltd. v. *ICC*, 665 F.2d 1304, cert. denied, 456 U.S. 905 9

Motor Carriers Traffic Association v. *United States*, 559 F.2d 1251, cert. denied, 435 U.S. 1006 7

Providence & W. R.R. v. *United States*, 666 F.2d 736 9

Southern Motor Carriers Rate Conference, Inc. v. *United States*, 676 F.2d 1374 8

Page

Statutes and regulation:

Interstate Commerce Act, 49 U.S.C. (& Supp. IV) 1 *et seq.* 2
49 U.S.C. (Supp. IV) 10706(b) 7
49 U.S.C. (Supp. IV) 10707 2
49 U.S.C. (Supp. IV) 10707(d)(1) 3
49 U.S.C. (Supp. IV) 10708 2
49 U.S.C. (Supp. IV) 10708(b) 3
49 U.S.C. (Supp. IV) 10761 2
49 U.S.C. (Supp. IV) 10762 6
49 U.S.C. (Supp. IV) 10762(a)(2) 2
49 U.S.C. (Supp. IV) 10762(b) 2, 6
49 U.S.C. (Supp. IV) 10762(c)(3) 2
49 U.S.C. (Supp. IV) 10762(d)(1) 2
49 U.S.C. (Supp. IV) 10762(e) 2, 6
49 U.S.C. (Supp. IV) 11701 5
49 U.S.C. (Supp. IV) 11705(b)(1) 4
49 U.S.C. (Supp. IV) 11705(b)(2) 3
49 U.S.C. (Supp. IV) 11705(b)(3) 3
49 U.S.C. (Supp. IV) 11901 2
49 U.S.C. (Supp. IV) 11903 2
49 C.F.R. 1300.2(a)(1) 3

Page

Miscellaneous:

Motor Carrier Rate Bureaus - Implementation of Pub. L. 96-296, Ex Parte No. 297 (Sub. No. 5), 46 Fed. Reg. 30092 (1981) 7

44 Fed. Reg. 60123 (1979) 3

46 Fed. Reg. 30105 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-24b)[1] is reported at 682 F.2d 1092. The decisions of the Interstate Commerce Commission (Pet. App. 1c-67c, 1d-12d, 1e-28e) are reported at 364 I.C.C. 217, 365 I.C.C. 43, and 44 Fed. Reg. 60122, respectively.

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[1] "Pet. App." refers to the appendix in No. 82-707.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1f-2f) was entered on August 9, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 1g-2g). The petition for a writ of certiorari in No. 82-707 was filed on October 22, 1982, and the petition in No. 82-804 was filed on November 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, 49 U.S.C. (& Supp. IV) 1 *et seq.*, carriers establish and change their rates for transportation services by filing rate schedules, known as tariffs, with the Interstate Commerce Commission. The Act requires that newly filed tariffs "plainly identify" any proposed rate change, 49 U.S.C. (Supp. IV) 10762(c)(3), and authorizes the Commission to prescribe the form for filing tariffs, 49 U.S.C. (Supp. IV) 10762(b). The Commission is empowered to reject tariffs that violate the filing regulations. 49 U.S.C. (Supp. IV) 10762(e). Carriers are permitted to collect only the rates specified by tariffs on file, 49 U.S.C. (Supp. IV) 10761, and departure from those filed rates subjects a carrier to civil and criminal liability. 49 U.S.C. (Supp. IV) 11901, 11903.

A rate filed with the Commission generally becomes effective after a waiting period.[2] During this period, the Commission entertains protests against the rate and decides whether to reject it, suspend its effectiveness, investigate it, or permit it to become effective without investigation. See 49 U.S.C. (Supp. IV) 10762(e), 10707, 10708. Unless the

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[2]The waiting period for railroad rates is 20 days (10 days for reductions), 49 U.S.C. (Supp. IV) 10762(c)(3), and motor carrier rates become effective after 30 days, 49 U.S.C. (Supp. IV) 10762(a)(2). The Commission, however, has the power to shorten the waiting period. 49 U.S.C. (Supp. IV) 10762(d)(1).

Commission rejects or suspends the rate during the waiting period, the rate becomes applicable, and carriers must charge that rate and shippers must pay it. The applicable rate nonetheless may be "unlawful" for some reason. See, e.g., Arizona Grocery Co. v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, 384 (1932). For example, an applicable rate may later be determined to be unreasonably high, in which case the Act makes the carrier liable to refund that part of the rate found to be unreasonable. 49 U.S.C. (Supp. IV) 10707(d)(1), 10708(b), 11705(b)(2) and (3).

2. One of the Commission's filing regulations requires that all tariffs bear appropriate symbols indicating whether the tariff increases, decreases, or causes neither an increase nor decrease in existing rates. 49 C.F.R. 1300.2(a)(1). Because the tariffs are "long and detailed" (Pet. App. 23b), these symbols are necessary in order to notify tariff users of a proposed increase or other change so that they can evaluate those changes and, if they desire, timely protest them. See *id.* at 3b; 44 Fed. Reg. 60123 (1979). Until 1979, the Commission examined every filing for obvious defects (including symbolization errors) prior to the tariff's effective date. Tariffs submitted with incorrect symbols were rejected, and the carrier was required to refile the tariff in acceptable form. Because this preexamination procedure provided safeguards against the possibility that a tariff would become effective without notice that a rate increase was being proposed, the Commission generally imposed no penalty on those rare occasions when a symbolization error was discovered after a tariff had gone into effect. Rather, the Commission simply advised the carrier of the error and requested that it take more care in the future. See Pet. App. 3b.

When budget reductions forced the Commission to reallocate its scarce resources, however, the Commission determined that it could no longer maintain sufficient tariff

examiners to preexamine every filing. Accordingly, in October 1979, the Commission began reviewing only a random sample of tariff filings.[3] At the same time, the Commission proposed the symbolization rules at issue here as Ex Parte No. 370 (Pet. App. 5e-7e).[4] In the notice of proposed rulemaking, the Commission stated that it expected that some of the symbolization errors that previously would have been discovered by preexamination would now escape detection under the random sampling procedure (*id.* at 6e). Focusing its attention on rate increases, the Commission explained that accurate symbols enable tariff users to discover and evaluate rate changes, which is "vital to tariff users' rights to timely protest proposed tariff changes" (*id.* at 5e). If users could not rely on accurate symbols, they would "be burdened with the onerous chore of comparing proposed tariff filings word-for-word or figure-for-figure against existing tariff matter" (*id.* at 6e). To protect tariff users against deprivation by mis-symbolization of their right to protest rate increases, the Commission proposed to make improperly symbolized rate increases invalid and uncollectable and to allow shippers to recover amounts already paid as overcharges.[5] Pending properly symbolized refiling of the invalidated tariffs, the applicable rates would be the ones in existence before the improperly symbolized tariff was filed. The proposed rules also provided that disagreements on the factual question

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[3]Currently, the Commission examines only the title pages of tariff filings.

[4]Apart from the symbolization requirements, the proposal and rule ultimately promulgated also contained other new tariff rules that are not in issue here.

[5]Overcharges are amounts that exceed the applicable rate set forth in a tariff filed under the Act's tariff filing requirements. 49 U.S.C. (Supp. IV) 11705(b)(1). See Pet. App. 18b-20b.

whether a tariff provision had been improperly symbolized would be resolved by the Commission (Pet. App. 7e).[6]

After considering comments on its proposal, the Commission adopted the proposed symbolization rules without change on August 14, 1980 (Pet. App. 10c-16c, 57c). The Commission explained that the tremendous increase in the number of tariff filings,[7] combined with budgetary and personnel constraints, justified the new rules (*id.* at 10c-11c). The Commission rejected the suggestion of some commenters that improperly symbolized increases not be treated as overcharges (*id.* at 13c-14c). The Commission stressed that it no longer was in a position itself to prevent improperly symbolized rate increases from becoming effective (*id.* at 11c), and therefore it was necessary to increase the emphasis on the submission of properly symbolized tariffs (*id.* at 14c). It noted that the tariff publisher ordinarily can determine easily whether a particular tariff change results in an increase, and further stated that tariff publishers uncertain about the effect of a particular tariff change could seek Special Permission authority to waive the symbolization requirements (*id.* at 15c). Finally, the Commission concluded that the special potential for harm to tariff users justified invalidating improperly symbolized increases but not reductions (*ibid.*). The Commission subsequently denied petitions for reconsideration of the symbolization rules (Pet. App. 4d).

3. The court of appeals affirmed the validity of the symbolization rules in all respects (Pet. App. 1b-24b). The court first held that the rules do not exceed the Commission's statutory authority (*id.* at 5b-20b). The court explained that

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[6]The Act establishes formal complaint procedures for overcharge disputes. 49 U.S.C. (Supp. IV) 11701.

[7]In fiscal year 1979, the Commission received more than 100,000 more tariff publications than in fiscal year 1978 (Pet. App. 11c).

Section 10762 of the Act permits the Commission to reject a tariff that has gone into effect but was not filed in the prescribed format, noting that the section is not limited to "proposed" or "ineffective" tariffs and places no time constraints on the power to reject (*id.* at 6b-11b).[8] The court then upheld the Commission's authority to impose overcharge liability for improperly symbolized increases (*id.* at 11b-20b). Drawing a distinction between "applicable" rates (those that have been filed and accepted by the Commission) and "lawful" rates (those filed in accordance with the Act and Commission regulations), the court concluded that shippers always must pay the "applicable" rate, but they are entitled to recover overcharges if the Commission later detects a defect that makes the rate unlawful (*id.* at 16b-18b).

The court also rejected the argument that the new rules are arbitrary and capricious (Pet. App. 20b-23b). The court explained that the Commission "can no longer afford to police the thousands of rate changes that are published weekly" and therefore "must shift the burden of ensuring exact compliance with symbolization requirements to the carriers themselves" (*id.* at 22b). In these circumstances, the court concluded that the Commission was "not unreasonable in concluding that overcharge liability is the most appropriate means of encouraging the carriers to check and recheck thoroughly all tariff revisions," particularly since each carrier has the power to prevent any recovery against it simply by carefully carrying out its own legal obligation to put the correct symbols on its rate increases (*id.* at 23b). Finally, the court rejected the claim that imposition of

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[8]The court recognized (Pet. App. 11b n.7) that the rules were promulgated as a means of enforcing the symbolization requirements issued by the Commission under Section 10762(b)(1), rather than pursuant to the Commission's authority to reject tariffs in Section 10762(e).

overcharge liability would be particularly unfair in certain hypothetical situations, explaining that the ordering of a refund is discretionary and the Commission retains the right to fashion relief appropriate to the particular circumstances (*id.* at 23b-24b).

DISCUSSION

Petitioners contend that the Commission lacked the authority to promulgate rules that invalidate and treat as overcharges rate increases that have already gone into effect because they do not conform to the Commission's filing requirements. We believe that the court of appeals correctly rejected this contention. The decision below conflicts, however, with that of another court of appeals, and the resolution of the question presented here is of great practical importance. Accordingly, we do not oppose the grant of these petitions for certiorari.

1. In Ex Parte No. 297 (Sub. No. 5), *Motor Carrier Rate Bureaus - Implementation of Pub. L. 96-296,* 46 Fed. Reg. 30092 (1981), the Commission established new rules to implement statutory amendments in connection with motor carrier rate bureau agreements.[9] As pertinent here, the Commission ruled that it will enforce the rate bureau provisions by rejecting tariffs where there is proof of significant violations of an approved agreement. 46 Fed. Reg. 30105 (1981). In *American Trucking Association* v. *United States,* 688 F.2d 1337 (1982), the Eleventh Circuit struck down this aspect of the Commission's new rules. 688 F.2d at

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[9]Since 1948, members of motor carrier bureaus have enjoyed antitrust immunity for collective ratemaking. This immunity is obtained by submitting a rate bureau agreement to the Commission for its approval and acting in conformity with the terms of the agreement. See 49 U.S.C. (Supp. IV) 10706(b); *Motor Carriers Traffic Association* v. *United States,* 559 F.2d 1251, 1253-1254 (4th Cir.), cert. denied, 435 U.S. 1006 (1977).

1352-1356.[10] The court held that rejection of a tariff after it has become effective is in conflict with the underlying statute and thus beyond the Commission's authority. *Id.* at 1355. The court stated that when a filed and effective tariff is found to be unlawful, the Commission must prescribe the proper rate and that liability for *damages* (as distinguished from overcharges) may then arise (*id.* at 1354). However, once a tariff has become effective, the carrier may not be ordered to refund, as an overcharge, the difference between the rates paid and the former tariff (*id.* at 1355).

Although it deals with a different Commission rule, the Eleventh Circuit's decision in *American Trucking Association* is irreconcilable with the decision below.[11] The Eleventh Circuit has held that the Commission is simply without power to create overcharge liability by invalidating ab initio a tariff once it has gone into effect. It is therefore clear that the Commission's symbolization rules upheld by the court below, which permit the Commission to invalidate and treat as an overcharge a missymbolized rate increase that has

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[10]With the exception of one portion of the rules held invalid for failure to comply with notice and comment procedures, the other portions of the rules not pertinent here were upheld. See 688 F.2d at 1340-1352.

[11]The Eleventh Circuit previously had held in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374 (1982), that the Commission lacked authority to reject, on the basis of informal proceedings before the Tariff Integrity Board, an improperly published tariff that had gone into effect. The court had reserved the question whether the Commission could exercise that authority through formal procedures (*id.* at 1379 n.14), and the court below distinguished *Southern Motor Carriers* on that basis (see Pet. App. 11b n.6). In *American Trucking Association*, however, the Eleventh Circuit makes it clear that it does not recognize the Commission's authority to reject tariffs that have become effective, even through formal procedures. 688 F.2d at 1354.

already gone into effect, would be struck down by the Eleventh Circuit.[12]

The confusion in the lower courts over the Commission's power to reject tariffs after they have gone into effect is not confined to these two circuits. In promulgating the symbolization rules, the Commission cited (see Pet. App. 12c-13c, 6e-7e) the Ninth Circuit's decision in *Chicago, M., St. P. & P. R.R.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (1957), in which the court upheld overcharge liability where an effective tariff was unlawfully established because the carrier failed to satisfy the 30-day notice requirement. This aspect of *Alouette* has been criticized, however, both in *American Trucking Association* (688 F.2d at 1355-1356) and in *Genstar Chemical, Ltd.* v. *ICC*, 665 F.2d 1304, 1308-1309 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982), which held that a defect in a tariff does not necessarily render the tariff a nullity and create overcharge liability. See also *Providence & W. R.R.* v. *United States*, 666 F.2d 736, 744 (1st Cir. 1981).

It is important that the Court resolve at this time the conflict in the circuits concerning the Commission's tariff rejection authority. The symbolization rules at issue here are an integral part of the Commission's program for effective enforcement of the tariff provisions that form the core of the Interstate Commerce Act. Tariffs give notice to shippers about rate levels, and symbols provide the only practical way for shippers to learn of rate increases in time to exercise their statutory right to protest and seek

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[12]The United States and the Commission are planning to seek certiorari in the *American Trucking Association* case. Accordingly, we believe it would be appropriate for the Court to defer consideration of these petitions until the petition in *American Trucking Association* is filed, so that it may consider the cases together.

suspension of those increased rates.[13] After careful consideration, the Commission has determined that the tariff rejection rule is an appropriate and fair tool for ensuring the continued reliability of tariff symbols, given the practical need to shift the burden of monitoring symbolization to the carriers who file the tariffs. The question of the validity of these rules potentially touches on thousands of rate changes filed each year, involving thousands of shippers, millions of freight movements, and large amounts of money. The existing situation in which the rule is effective in some circuits and not in others is simply intolerable. Accordingly, we ask the Court to grant certiorari to resolve the validity of the symbolization rules and to end uncertainty about the Commission's tariff rejection authority.

2. Although we do not oppose the grant of these petitions for certiorari, we believe that the court of appeals correctly upheld the Commission's symbolization rules. As the court of appeals explained (Pet. App. 6b-11b), the Act does not limit the Commission's rejection power to tariffs that have not yet gone into effect. A tariff that has gone into effect establishes the applicable rate for all shippers and carriers. But if that rate turns out to be unlawful because the tariff was improperly filed, the statute does not prohibit the Commission from treating the unlawful increase as an overcharge (*id.* at 11b-20b).[14]

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[13]The notice requirement adverted to by petitioners (82-707 Pet. 3) simply provides notice that a tariff change is being proposed. It does not take the place of symbolization because, without appropriate symbols, there is often no simple way for a tariff user to determine whether the proposed tariff changes involve increases.

[14]Petitioners' fears (see 82-707 Pet. 20) that carriers automatically will be subjected to "tens of millions of dollars" of absolute liability if shippers wait three years before calling attention to symbolization errors are unfounded. As the court of appeals stated (Pet. App. 23b-24b), the ordering of an overcharge refund is discretionary, and the

Petitioners contend (82-707 Pet. 14-18; 82-804 Pet. 15) that the decision below conflicts with this Court's decision in *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924). That case, however, did not address the situation presented here. In *Davis*, a shipper had paid the lawful rate for shipping a commodity between two points. The carrier, however, had also published a lower rate for a longer haul including those points without obtaining the required permission from the Commission to charge less for the longer haul than for the shorter haul. The shipper argued that the low rate for the longer haul should automatically have become the maximum rate for all shorter hauls along that route and hence that it was entitled to recovery for overcharges. The Court rejected that contention, explaining that "mere publication of the forbidden lower rate did not wholly efface the [properly published] higher intermediate one from the schedule and substitute for all purposes the lower one" (264 U.S. at 424-425), and that the shipper was limited to a damages remedy. That holding does not extend to the instant situation where shippers would have paid the very "forbidden" rate published in violation of the Commission's filing requirements. Further, here it is the Commission, through a duly promulgated regulation, that seeks to invalidate the rate; in *Davis* shippers sought judicial invalidation of the higher rate in contravention of the Commission's rules.[15]

Commission retains the right to fashion relief appropriate to the circumstances. In a recent decision (App., *infra*, 1a), the Commission has confirmed its agreement with this statement, explaining that there will not be "automatic liability for overcharges every time it is determined that a [sic] increase was improperly symbolized," and that "the rules will be applied on a case-by-case basis * * *."

[15] In *Berwind-White Coal Mining Co.* v. *Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), the Court simply held that the alleged informalities in the tariff filing were not grounds for invalidation of the tariff.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1983

DOJ-1983-02

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE NO. 370

TARIFF IMPROVEMENT

Decided: December 29, 1982

[Service Date: Jan. 17, 1983]

The Ex Parte No. 370, *Tariff Improvement* rules pertaining to improperly symbolized increases have been affirmed by the United States Court of Appeals for the Fifth Circuit. *Aberdeen and Rockfish Railroad Company, et al.* v. *United States of America, et al.*, 682 F.2d 1092 (5th Cir. 1982), petitions for certiorari pending.[1]

We continue to believe that these rules are the most effective means to insure the accuracy of the symbols used in tariff filings. However, in accordance with the court's holding that the ordering of refunds remains discretionary and that the Commission retains the right to fashion relief appropriate to individual circumstances, 682 F.2d at 1105, we want to make clear that Ex Parte No. 370 will not result in automatic liability for overcharges every time it is determined that a [sic] increase was improperly symbolized. Rather, the rules will be applied on a case-by-case basis with the possibility that shipper recovery could equal the difference between the missymbolized rate and the prior rate. *See*, No. 37146, *Transit on Wheat Between Reshipping Point and Destination*, served July 29, 1982, and the *Insulating Materials* case (3641 [sic] I.C.C. 559, 683 F.2d 533).

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[1]No. 82-707, *Aberdeen & Rockfish Railroad Company, et al.* v. *United States, et al.*; No. 82-804, *National Motor Freight Traffic Association Inc.* v. *United States of America, et al.*

The Ex Parte No. 370 symbolization rules have never gone into effect because they were stayed by the Fifth Circuit pending judicial review. The Fifth Circuit, however, has denied the railroad's petition for stay pending the filing of a petition for certiorari. Accordingly, these rules will go into effect 30 days from the date of service of this decision.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Vice Chairman Gilliam and Commissioner Andre were absent and did not participate.

JAMES H. BAYNE
Acting Secretary

(SEAL)